Ramasamy a/l Amaippan v Kwan Lee Pin (Majlis Peguam Malaysia, intervener)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(A)-1126–07 OF 2015
HAMID SULTAN, ABANG ISKANDAR AND NALLINI PATHMANATHAN JJCA
23 MAY 2017

Legal Profession — Disciplinary proceedings — Disciplinary Committee — Allegation that advocate and solicitor failed to return overpayment to client — Disciplinary Committee made findings based on documents adduced by client but client failed to show up to testify — Client could not be cross-examined — Advocate and solicitor suspended from practice — Whether decision made by Disciplinary Board, upon recommendation of Disciplinary Committee, fair

The respondent had lodged a complaint with the Advocates and Solicitors Disciplinary Board ('DB') that the appellant, an advocate and solicitor, had failed to return to her an overpayment of RM51,500 pursuant to the purchase of a double-storey house ('the house') by the respondent in 2001. The appellant was the solicitor acting for her in the said transaction. Having completed its investigation into the complaint, the Disciplinary Committee ('DC') established under the Legal Profession Act 1976 ('the LPA') to look into the matter, had found merit in the complaint and recommended to the DB that the appellant be suspended from legal practice for 12 months and ordered the appellant to make restitution of the RM51,500 to the respondent. During the hearing before the Disciplinary Committee ('the DC'), the respondent did not appear to testify and the appellant could not cross-examine her. On 17 January 2015, the DB affirmed the finding of the liability by the DC but disagreed with the recommendation of the DC. The DB instead issued an order that the appellant be suspended from practice as an advocate and solicitor and to make restitution of the sum of RM70,000 within one month from the date of the said order. Upon appeal by the appellant against the said order by way of an originating motion, the High Court judge affirmed the decision. Hence the present appeal against the said decision of the High Court judge.

Held, allowing the appeal:

(1) The DC had acted upon a document, albeit a police report, that was not subject to cross-examination by the appellant. With no cross-examination having been afforded to him, the appellant had been severely handicapped in presenting his case. Any decision made as a result of such proceeding could not be allowed to stand and ought to be set

aside. The HCJ did not give much consideration to the issue on cross-examination it deserved. The non-direction amounted to a misdirection (see paras 18, 23 & 26).

(2) The DC must act on the evidence given by the various witnesses. Therefore, it was imperative for it to keep a proper record of what had transpired before it, in terms of the testimonies of the witnesses. However, there was no verbatim recording of the evidence of the various witnesses, in particular that of the appellant. No mention was made of the issue pertaining to the denial of cross-examination to the appellant. A verbatim record of the proceedings would have taken care of the matter by referring to the record of the proceedings, as recorded by the DC. If there was no such record, no allegation of this kind could have surfaced (see paras 29–30).

(3) This was clearly a case of an omission on the part of the DC to direct its mind, as to the standard of proof against which the evidence ought to be subjected to in coming to its conclusion. In the absence of any record of evidence at the DC pertaining to that crucial part of the proceedings, it would be impossible for the DB to ascertain any of those facts. The DC had not addressed the critical issue of dishonesty on the part of the appellant at all. The DC failed to comply with the proper procedure in its decision-making process in coming to its conclusion before making its recommendations to the DB. The rule on the onus or burden of proof is embedded in the principle that one who alleges must prove his allegation. In this case, the onus would lie on the respondent to show the dishonest conduct that she had alleged against the appellant. In a civil proceeding, both parties carry the burden of proving its case, although the initial onus is inevitably placed on the plaintiff, as is typical in an adversarial system (see paras 32, 40 & 42–43).

[Bahasa Malaysia summary

Responden telah membuat aduan kepada Lembaga Tatatertib Peguambela dan Peguamcara ('Lembaga') bahawa perayu, seorang peguambela dan peguamcara, gagal membayar balik kepadanya lebihan bayaran sebanyak RM51,500 bagi pembelian sebuah rumah dua tingkat ('rumah tersebut') oleh responden pada tahun 2001. Perayu adalah peguam cara yang bertindak untuknya dalam transaksi tersebut. Setelah selesai menyiasat aduan tersebut, Jawatankuasa Tatatertib ('Jawatankuasa') yang ditubuhkan di bawah Akta Profesion Undang-Undang 1976 ('Akta') untuk meneliti perkara itu, mendapati terdapat merit dalam aduan tersebut dan mengesyorkan kepada Lembaga agar perayu digantung daripada amalan undang-undang selama 12 bulan dan memerintahkan perayu membuat restitusi RM51,500 kepada responden. Semasa pendengaran di hadapan Jawatankuasa, responden tidak hadir untuk memberi keterangan dan perayu tidak boleh memeriksa balasnya. Pada 17 Januari 2015, Lembaga mengesahkan penemuan liabiliti oleh

Jawatankuasa tetapi tidak bersetuju dengan cadangan Jawatankuasa. Lembaga sebaliknya mengeluarkan perintah yang perayu digantung dari amalan sebagai peguam bela dan peguam cara dan membuat restitusi sebanyak RM70,000 dalam tempoh satu bulan dari tarikh perintah tersebut. Apabila rayuan oleh perayu terhadap perintah tersebut dibuat melalui usul pemula, hakim Mahkamah Tinggi ('HMT') mengesahkan keputusan tersebut. Oleh itu, rayuan ini terhadap keputusan hakim Mahkamah Tinggi.

Diputuskan, membenarkan rayuan:

(1) Jawatankuasa telah bertindak berdasarkan dokumen, walaupun ini satu laporan polis, yang tidak tertakluk pada pemeriksaan balas oleh perayu. Dengan ketiadaan pemeriksaan balas terhadapnya, perayu terjejas teruk dalam mengemukakan kesnya. Apa-apa keputusan yang dibuat hasil prosiding sedemikian tidak boleh dibenarkan kekal dan patut diketepikan. HMT tidak memberikan pertimbangan wajar terhadap isu mengenai pemeriksaan balas yang patut diberi. Ketiadaan arahan ini terjumlah sebagai satu salah arahan (lihat perenggan 18, 23 & 26).

(2) Jawatankuasa mesti bertindak atas keterangan yang diberi oleh pelbagai saksi. Oleh itu, adalah mustahak untuk menyimpan rekod yang betul tentang apa yang berlaku sebelum ini, dari segi keterangan saksi-saksi. Walau bagaimanapun, tidak terdapat rakaman verbatim mengenai keterangan dari pelbagai saksi, khususnya perayu. Tidak disebutkan mengenai masalah penafian pemeriksaan balas terhadap kepada perayu. Rekod *verbatim* prosiding akan menyelesaikan masalah ini dengan merujuk rekod prosiding, seperti yang dicatatkan oleh Jawatankuasa. Sekiranya tidak ada rekod sedemikian, tiada dakwaan sebegini yang boleh timbul (lihat perenggan 29–30).

(3) Ini jelas merupakan satu kes ketinggalan di pihak Jawatankuasa untuk mengarahkan fikirannya, terhadap standard pembuktian yang mana semua keterangan harus dirujuk padanya sebelum mencapai keputusan. Tanpa apa-apa rekod keterangan semasa Jawatankuasa berkaitan bahagian penting prosiding tersebut, adalah mustahil untuk Lembaga menentukan mana-mana fakta tersebut. Jawatankuasa tidak menangani isu kritikal ketidakjujuran di pihak perayu sama sekali. Jawatankuasa tidak mematuhi prosedur yang betul dalam proses membuat keputusannya untuk mencapai kesimpulannya sebelum membuat cadangan kepada Lembaga. Aturan mengenai beban atau beban pembuktian terdapat dalam prinsip bahawa seseorang yang menuduh mesti membuktikan tuduhannya. Dalam kes ini, tanggungjawab terletak pada responden untuk menunjukkan kelakuan tidak jujur yang didakwa dilakukan terhadap perayu. Dalam prosiding sivil, kedua-dua pihak memikul beban membuktikan kesnya, walaupun kewajipan awalnya, tidak dapat dielakkan, terletak pada plaintif, seperti kebiasaannya

A terdapat dalam sistem adversarial (lihat perenggan 32, 40 & 42–43).]

Notes

For cases on disciplinary committee, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1595–1601.

B

Cases referred to

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169; [1962] 1 LNS 14, PC (refd)
C *Bryant and another v Law Society* [2009] 1 WLR 163, QBD (refd)
Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1984] UKHL 9, HL (refd)
Gillies v Secretary of State for Work and Pensions [2006] 1 All ER 731, HL (refd)
Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254b; [1977] 1 D LNS 86, FC (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [2000] 1 CLJ 503, CA (refd)
E *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Legislation referred to

Evidence Act 1950 s 103
F Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 r 24
Legal Profession Act 1976
Rules of the Court of Appeal 1994

G

Appeal from: Originating Motion No 25–3–2 of 2015 (High Court, Seremban)

Gunaseelan (Rama Velu with him) (Rama Velu & Assoc) for the appellant.
Shamsul Bahrin (CK Lai & Co) for the respondent.
H *M Rajkumar (Bar Council Malaysia) (Law, Raj, Teh & Partners) for the intervener.*

Abang Iskandar JCA (delivering judgment of the court):

I BRIEF FACTS OF THE CASE

[1] Kwan Lee Pin ('the respondent') had lodged a complaint with the Advocates and Solicitors Disciplinary Board ('DB') in that Ramasamy a/l Amaippan, an advocate and solicitor ('the appellant') had failed to return to her

an overpayment of RM51,500 pursuant to the purchase of a double storey house at Taman Desa Melati, Phase 2, Nilai, Negeri Sembilan ('the house') by the respondent in 2001. The appellant was the solicitor acting for her in the said transaction.

[2] Having completed its investigation into the complaint, the disciplinary committee ('DC') established under the Legal Profession Act 1976 ('the LPA 1976') to look into the matter, had found merit in the complaint and recommended to the DB that the appellant be suspended from legal practice for twelve months and ordered the appellant to make restitution of the RM51,500 to the respondent.

[3] Then, on 17 January 2015, the DB affirmed the finding of the liability by the DC but disagreed with the recommendation of the DC. The DB instead issued an order that the appellant be suspended from practice as an advocate and solicitor and to make restitution of the sum of RM70,000 within one month from the date of the said order.

[4] Upon appeal by the appellant against the said order by way of an originating motion, the high court judge affirmed the decision of the DB on 27 May 2015.

[5] The appellant had since appealed to the Court of Appeal against the said decision of the learned High Court judge.

THE APPEAL

[6] We heard the appeal on 4 October 2016. Before us, the appellant complained that the DC had committed serious errors of law and gave no proper appreciation of the evidence and had therefore erred in its findings. His pleaded grounds for dissatisfaction for the following reasons:

(a) failure to appreciate that the burden of proof was on the respondent to show that she had suffered a loss of RM70,000 ie that she had paid the sum of RM70,000 to the appellant. In other words that the said sum of RM70,000 had been debited from her bank account;

(b) failure to appreciate that since the allegation involved an element or deceit or moral turpitude, a high standard of proof was called for, ie that the standard of proof required was proof beyond a reasonable doubt. This was therefore a misdirection by way of a non-direction;

(c) reversal of the burden of proof by requiring the appellant to prove that the sum of RM70,000 was not deposited into his firm's client's account (but required no proof from the respondent that her bank account had been debited by the said sum of RM70,000);

(d) failure to comprehend the complaint (after having identified the complaint) by finding that there was no satisfactory explanation for the appellant as to the manner of the payment of the purchase price to the vendor. The manner of payment of the purchase price to the vendor was not the complaint;

(e) failure to consider the proper test for dishonesty. The DC did not address this important issue at all. This is a serious error of law. It was contended that it was a misdirection by way of non-direction. In fact, the DC did not make any finding of dishonesty against the appellant;

(f) failure to appreciate the contemporaneous documents ie the appellant's client's account bank statement for the month of January 2001 which clearly showed that the alleged sum of RM70,000 was never credited into the account ie the appellant did not receive the said sum;

(g) having identified the appellant's explanation to be that the respondent had RETURNED the physical Oriental Bank Bhd cheque No 119783 to the respondent, then went on a frolic of its own by holding to the contrary, ie that the appellant's case was that he had REFUNDED the sum of RM70,000 to the respondent. The appellant's case was that he had never refunded the said sum of RM70,000 to the respondent. In effect the DC had erroneously recorded the evidence of the appellant on a material issue;

(h) failure to appreciate the questionable nature of the complaint in that, the sale and purchase transaction was concluded sometime in June 2001 but this complaint was filed only in November 2012 ie some 11 years later. The explanation offered by the respondent for the delay being that she only found out about the alleged missing RM70,000 in August 2012 when she was checking her file, is beyond belief. How could someone not know that a substantial sum of RM70,000 was missing from her account for 11 years when she would have received bank statements EVERY MONTH from her bank? This fact was totally ignored or missed by the DC when considering the evidence in its totality; and

(i) failure to allow the appellant to cross-examine the respondent. This is a serious miscarriage of justice. In fact the respondent did not give evidence and did not offer herself for cross-examination. Instead her husband had appeared before the DC.

[7] At the beginning of the hearing of this appeal, it was indicated to us by learned counsel that the apex court had just recently decided that there was no need for the complaints under the LPA 1976 against errant lawyers be framed in the format *akin* to the charges that are preferred against an accused person in a criminal trial. It would be sufficient that the gravamen of the complaint against the errant lawyer is communicated in a manner that would enable the

errant lawyer to answer to the charges during the DC proceedings. With that issue having been settled and the initial concern of the appellant having been addressed, we proceeded on to hear arguments by all learned counsel before us for the respective parties in this appeal.

[8] We had occasion to look at the memorandum of appeal filed by the appellant. From the pleadings made therein, there were clear points of law that were raised on behalf of the appellant. In the main, his complaints had pertained to the issues relating to the standard of proof, the onus or the burden of proof, breach of natural justice, the effect of delay on the part of the respondent in pursuing her allegations against the appellant and the failure of the DC to correctly appreciate the evidence adduced before it.

[9] We propose to state of the position of the law on those issues first and once that is made clear, we will then proceed to look at the record of appeal and the evidence that was led by witnesses during the DC proceedings that was set up under the LPA 1976 to investigate into the allegations contained in the complaint lodged by the respondent against the appellant. The purpose of looking at the evidence would be to see whether findings made by the DC which formed the basis for its recommendations to the DB were justified. In other words, we would be scrutinising the body of evidence that was adduced before the DC, both for mass, as well as for quality.

BREACH OF NATURAL JUSTICE, DENIAL OF RIGHT TO CROSS-EXAMINATION TO THE APPELLANT

[10] The principle of *audi alteram patem* is a real principle of law as much as it is a fundamental one. Literally, it emphasises the crucial need 'to hear the other side'. In the Privy Council case of *B Surinder Singh Kanda v The Government of the Federation Of Malaya* [1962] 1 MLJ 169; [1962] 1 LNS 14 Lord Denning had put in a succinct description of what natural justice ought to necessarily entail, like so:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.

[11] And at p 495 of the report, the learned Law Lord had continued:

> Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense if having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes

to act judicially. And the greater the importance of observing the maxim, *audi alteram partem*.

[12] No one could have described it any better. A denial of cross-examination is a material non-compliance amounting to a breach of natural justice. In the celebrated case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1984] UKHL 9 ('the *CCSU* case') a non-compliance of natural justice qualifies as a ground to quash the impugned decision on the ground of procedural impropriety, which Lord Diplock had explained as a decision that was made in defiance of set procedures prescribed by a statute or where the 'rules of natural justice' have not been adhered to by the decision-maker. The twin pillars upon which the rules of natural justice are hoisted consist of the rule against bias or *nemo iudex in causa sua*, which basically means that a man ought not to be a judge in his own cause, and secondly, the *audi alteram patem* rule, which encapsulates the right of the other side to be heard. In an article entitled *The Rule against Bias* by Mathew Groves (2009) UMonashLRS 10 it was observed that while the hearing rule, being the right to be heard, governs the procedural features of decision making, the bias rule governs the attitude or the state of mind of the decision maker. We found that observation to be an apt one. It captures in gist, what the rules of natural justice entail in practical terms, in the context of judicial and quasi-judicial proceedings. An astute adherence to this important concept will invariably result in impartiality, a much sought-after commodity in all forms of tribunals which decide on the rights and liabilities of litigating parties. While it is important that a tribunal must be independent, nevertheless the need to be impartial cannot be overstated enough. And there is a distinct difference between independence and impartiality. Learned Baroness Hale had offered an explanation in distinguishing between the two concepts, in the House of Lords decision in *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731, like so:

> Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal's members but also the perception of the public.

[13] An eco-system of independence will engender impartiality to flourish. Impartiality must be seen to be practised and a scrutiny as to how a proceeding of an adversarial nature has been conducted provides, in our view, as a useful barometer to gauge whether adherence to crucial procedural imperatives have been followed, and followed meaningfully by the tribunal.

[14] In our instant appeal, the allegations against the appellant had brought into focus the impact that they may have on his livelihood, as a senior practising advocate and solicitor.

[15] It was never disputed by parties that the appellant was not given the opportunity to cross-examine the respondent. Learned counsel for the respondent in his written submissions had attempted to downplay the significance of abiding by the rule of natural justice, in the sense that cross-examination may be dispensed with. He went on to cite the Federal Court case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 and learned counsel went on to refer to us the passage in the apex court's judgement where the following appears:

> Rules are rules! They must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence to the rules. I agree. However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. The judge should be mindful of r 102 of the RCA which provides that 'non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void'. The said rule also provides for the discretionary power of the judge to deal with such irregularity 'in such manner and upon such terms' as the judge thinks fit. Therefore, a fair minded judge should look at all the circumstances of the case before penalising the party who infringes any particular rule of procedure.

[16] The message that learned counsel intended to drive home was the point that rules, though important, are by no means sacrosanct, whereby they must all be complied with at all costs. We had perused the decision of the apex court in the *Megat Najmuddin* case and we found that it was concerned with the applicability of the Rules of the Court of Appeal 1994 and noted that not all instances of non-compliance of those rules would be fatal in effect. Technical rules indeed must not stand in the way of dispensing substantial justice.

[17] But, that having been said, the scenario that obtained before us, presented a more serious non-compliance committed by the DC. In our instant appeal, a litigant before the DC was denied the opportunity to cross-examine his accuser. That, to our minds, had struck at the very heart of a proceeding premised upon the adversarial system of litigation that we are practising. It has been said that cross-examination is the greatest tool ever invented by men in the seeking for the truth between litigating parties.

[18] It must be recalled that it was the respondent who made the complaint. Her complaint contained allegations that suggested, at their lowest, that the appellant was a dishonest solicitor who had cheated her of RM70,000 in a house purchase transaction. Yet, when the hearing before the DC was held, the respondent chose not to appear to testify at the hearing against the appellant. Instead, she chose to present her husband to testify before the DC on her behalf. She had elected the mode as to how she desired to prove her case, and with it must come repercussions of great consequences which may impact

adversely against her in the whole scheme of things. Clearly by her absence, the appellant was denied the opportunity to cross-examine her on the crucial parts of her allegations upon which the complaint was premised. The appellant was denied the opportunity to cross-examine her on the police report which, as it would come to pass, had been used by the DC to premise its findings against the appellant. It was clear to us that the DC had acted on a document, albeit a police report, that was not subject to the crucible of cross-examination by the appellant. Its weight must be suspect, to say the least. But, truth be told, the mischief lies not only as to the weight to be attached, but rather more tellingly, on the injustice occasioned to the appellant by it, when he was denied the right to cross-examine its maker, namely the respondent. The breach of natural justice by the DC in the circumstances could not have been more apparent. The DC had required the appellant to come back to the hearing and to bring along with him all the relevant documents for the perusal of the DC. The DC had reversed the onus of proof onto the appellant to prove his innocence, when it should lie on the respondent to show dishonest conduct against the appellant. In the context of this complaint, the respondent showing evidence of her loss that was quite substantial would be the first crucial step in that direction.

[19] We had perused through the affidavits affirmed with regard to this issue. The appellant averred that he was not allowed to cross-examine the respondent. He first made that averment in his originating motion ('OM') in para 16 which was repeated in para 21 of his affidavit affirmed on 6 February 2015 to support the OM. The respondent in her affidavit affirmed on 23 March 2015 flatly denied this, by saying so:

> 21. Saya membantah perenggan 21 Afidavit Ramasamy a/l Amaippan bertarikh 6.2.2015 tersebut dan meletakkan beban pembuktian yang kukuh terhadap Perayu.

[20] No other averment was made in respect thereof. The intervener, through the evidence of its secretary Miss Karen Cheah Yee Lynn in her affidavit in reply dealt with that issue in para 12 therein. We reproduce the relevant parts of para 12 of Miss Karen's affidavit, that attempted to address the averment of the denial of cross-examination by the DC, as follows:

> 12. Saya merujuk kepada perenggan 7, 8, 9, 10, 21, 26, 27, 28, 29, 37, 42. Afidavit Perayu kandungan yang mana adalah dinafikan. Sebagai balasan saya merujuk kepada dan menerima pakai kandungan perenggan-perenggan yang terdahulu di dalam affidavit ini. Selanjutnya, saya juga menyatakan seperti berikut:
>
> 12.1 Prosiding Tatatertib telah dijalankan dengan adil dan sewajarnya mengikut Akta Profesion Undang-Undang & Peraturannya (seperti dipinda).

12.2 Perayu telah diberi peluang untuk menjawab aduan Responden dan telah diberi peluang untuk mengemukakan bukti dan juga diwakili oleh peguam menurut Akta Profesion Undang-Undang.

[21] Having considered the above affidavits in relation to the issue of the denial of cross-examination, with respect, we found that the response by the respondent, as could be seen in her affidavit, was but a bare denial. We said so because she did not attend the hearing before the DC. As alluded to earlier by us, that was an undisputed fact. Neither did she offer herself to be cross-examined by the appellant. She made the complaint and she made the police report. Both had damning effect on the integrity of the appellant. As for the response by the secretary of the Bar Council, she had averred to the effect that it was her belief that the hearing before the DC had been a fair one, where the appellant had been allowed to prove his case and to ask questions to the respondent's witness. But she never adverted to the allegation of denial of cross-examination by the appellant. The secretary ought to have queried members of the DC on this issue and have them or one of them to affirm an affidavit stating what actually had taken place during the DC hearing pertaining to this issue. We could see a close correlation between this issue with the other issue raised by the appellant pertaining to the non-compliance with r 24 by the DC. We will deal with that issue later in the course of this judgement. But, going back to the affidavits, we were of the view that a failure by an adverse party to usefully challenge a positive averment in an affidavit would amount to an admission of that averment. In our considered view there was nothing in the affidavits of the respondent and the secretary of the Bar Council that could even suggest to us that what was averred by the appellant on the denial to him to cross-examine the respondent had been rebutted. In other words, the net effect of it all must be that, it was actually true that the appellant had been denied the right to cross-examine the respondent by the DC during the hearing (see the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [2000] 1 CLJ 503).

[22] We had also perused the grounds of judgment of the learned High Court judge. Although she had noted, at para 27(vii) of her grounds of judgment, that one of the complaints brought before her was that the DC had 'failed to allow the appellant to cross examine the respondent', however, she had not directly addressed her mind on that complaint satisfactorily or at all. We would venture to surmise that para 57 of her grounds of judgment would encapsulate her findings on that complaint. We reproduce below, that relevant para 57 like so:

> The appellant was given the opportunity of participating at the hearing and he was given the opportunity to present his case and to exculpate himself and to prove his assertions.

[23] From a perusal of her grounds of judgment, it was apparent to us that the learned High Court judge did not give much consideration to the issue on cross-examination it deserved. We found that her conclusion that had found expression in para 57 of her grounds of judgment could not be supported. No decision made as a result of non-compliance by the tribunal of the rules of natural justice, in this case a denial of cross-examination to the adverse party can possibly withstand curial scrutiny.

[24] It was quite apparent to us that the learned High Court judge had not directed her mind sufficiently on the matter of cross-examination. The learned High Court judge did not, with respect, address the central issue of the alleged denial of cross-examination. With no cross-examination having been afforded to him, the appellant had been severely handicapped in presenting his case.

[25] As such, therefore, we were of the view that her non-direction had amounted to a misdirection.

[26] The appellant had been unfairly treated and substantial miscarriage of justice had been occasioned to him. The hearing at the DC had been vitiated for non-compliance. Such an injustice occasioned to the appellant must necessarily vitiate the 'justice' given in favour of the respondent. With respect, we agreed with learned counsel for the appellant that there was a serious misdirection in law by both the DC and the learned High Court judge. Any decision made as a result of such proceeding cannot be allowed to stand. It must therefore be set aside.

RULE 24 AND THE FAILURE OF THE DC TO RECORD NOTES OF PROCEEDINGS AT THE HEARING

[27] One of the issues that was raised early on by learned counsel for the appellant in the hearing of this appeal had been the lack of a proper record of the proceedings at the DC having been made. We could understand the great significance of that issue. The DC had made its crucial findings that were adverse against the appellant for a charge premised upon an attack on his honesty in the manner in which he had allegedly managed the respondent's money.

[28] Rule 24 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 provides as follow:

> 24 Record of proceedings before Disciplinary Committee
>
> The Disciplinary Committee *shall* make a record of all the evidence given before it.

[29] Strict compliance of r 24 is required. The DC is not a final arbiter of the dispute created by the lodging of the complaint. It investigates the allegation by hearing witnesses acquainted with the complaint lodged and at the end of that exercise it recommends actions to be taken against the errant advocate and solicitor, depending on the outcome of the investigation. Whatever its decision at the end of the investigation upon which its recommendations to the DB are premised, the DC must act on the evidence given by the various witnesses. Therefore, it is imperative that it keeps a proper record of what had transpired before it in terms of the testimonies of the witnesses. The DC's recommendations are subject to review by the DB who will definitely be interested to see the evidence of witnesses in cases where it may not agree with the recommendations made by the DC. The High Court may also want to see how the decisions are arrived at by the DB. It will be extremely difficult to verify the challenges made by the aggrieved parties pertaining to what had transpired at the DC hearing when there is insufficient record of the proceedings to substantially reflect what had transpired during the DC proceedings, before the review or appeal tribunal.

[30] What we had in the record of appeal among others, had been the report of the DC of the hearing into the complaint. It was apparent that the members had certified a summary of events as to what had transpired during the hearing. There was no verbatim recording of the evidence of the various witnesses, in particular that of the appellant. No mention was made of the issue pertaining to the denial of cross-examination to the appellant. A verbatim record of the proceedings would have taken care of the matter by referring to the record of the proceedings as recorded by the DC. If the contemporaneous records show that there was no such request ever being made by the appellant, a short shrift could be made of it and that would be the end of the matter. Indeed, if there be such a record, no allegation of this kind could have surfaced. But there was nothing in the report by the DC to the DB that had indicated such a request was made but, for some reason was denied by the DC or for that matter, an observation was made by the DC that the appellant did not make any request to cross examine the respondent. The fact that the affidavit affirmed by the secretary of the Bar Council, Ms Karen Cheah adverting to the matter in para 12 of her affidavit-in-reply to the appellant's OM by referring the matter on cross-examination to the members of the DC, did not help in any way. The significance of complying with r 24 cannot be overstated. Hence the mandatory dictate in which r 24 has been couched in its choice of language that was employed therein. There is much wisdom underlying that provision. The perils that may ensue, as a result of its non-compliance, in our considered view, have been clearly amplified in this appeal before us.

[31] We found that there was non-compliance of r 24 and that it had thereby compromised the decision-making process of the DC. The failure of the

learned High Court judge to deal with this crucial issue in her grounds of judgment amounted to an error of law leading to a decision which in our respectful view, is untenable. That must require our appellate intervention.

THE BURDEN OF PROOF

[32] The rule on the onus or burden of proof is embedded in the principle that one who alleges must prove his allegation. That is the placement of the legal onus of proof. In this case, the onus would lie on the respondent to show the dishonest conduct that she had alleged against the appellant. In a civil proceeding, both parties have carry the burden of proving its case, although the initial onus is inevitably placed on the plaintiff, as is typical in an adversarial system.

[33] In the case of *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 the then Federal Court had occasion at p 97, to state:

> It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct.

[34] With respect, the same procedure would apply here, *mutatis mutandis*. But the record of appeal before us did not evince the manner as to what standard of proof did the DC subject the evidence that it had gathered from the witnesses, in coming to its decision that there was merit in the respondent's complaint and its recommendations to the DB on the sanctions to be meted out against the appellant that had adverse implications on his livelihood.

[35] Learned counsel for the appellant had referred to us the position in England, where a two-tier exercise would be undertaken either by the court or tribunal that was looking into the alleged misconduct of a professional practitioner such as a solicitor on allegation of dishonest behaviour involving a client's funds. In particular, he had made reference to the test applied in the English case of *Bryant and another v Law Society* [2009] 1 WLR 163. In the approach that was applied in the *Bryant and another*'s case, firstly, it would require a finding as to whether the appellant had acted dishonestly by the ordinary standards of reasonable and honest people (the objective test); and then followed secondly, by asking the question of whether the appellant was aware (ie that the appellant knew) that by those standards he was acting dishonestly (the subjective test).

[36] It was impressed upon us that the DC did not undertake such a two-tier exercise in deciding the fate of the appellant, as would have been practised in England, in a similar proceeding against a lawyer alleged to have acted improperly in relation to his client's funds. The Federal Court in the *Au Kong*

Weng case had recognised that unique position obtaining before tribunals or committees dealing with complaints involving lawyers, and it had made the following remark:

> Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the *standards which responsible legal opinion demands of its own profession*. (Emphasis added.)

[37] It was clear in our view that the courts, like our counterparts in most Commonwealth jurisdictions, have taken the view that committees or tribunals set up under statutes to investigate into complaints against professionals like lawyer, doctors or engineers are given the leeway to set standards of conduct to be used to adjudge their peers in the respective professions. The courts recognise that necessity as the courts do not assume or even pretend to assume, to know better than the members of the respective professions themselves, the measure against which the alleged misconduct of professionals in their given fields of practice in the various professions.

[38] Reverting to the observation made by learned Justice Azlan Shah FCJ (as His Majesty then was) in the *Au Kong Weng* case it was incumbent on the DC to set the standard of conduct and also the test to be applied, in order to see whether the evidence adduced added up to evince a clear breach by the appellant of the standard that was set. We could see no alluding to any discussion of this nature, by the DC in the report that it had prepared and presented to the DB together with its recommendations. Justice Mahoney, President of the New South Wales Court of Appeal, Australia had occasion to say in the Supreme Court Annual Conference on 23 June 1995, the following:

> Judgments should refer shortly to the principles of law relevant to the determination of the question in dispute. If you do not remember to do this, then on appeal it may be argued that you did not know what the principles of law were or, indeed, that you did not know what you were deciding.

[39] The report that was prepared by the DC to the DB did not convey in it what process or processes had taken place during the hearing before the DC. If indeed it did, there was nothing in the record of appeal to evince the kind of mechanism employed by the DC against which the adduced evidence had been tested.

[40] In the circumstances, it was clear to our minds, that there was an omission on the part of the DC to direct its mind on the crucial finding both legally and factually as to whether the appellant had indeed acted in a dishonest manner as was complained by the respondent.

A THE STANDARD OF PROOF

[41] Next, would be the issue pertaining to the *standard of proof*, namely the level of certainty and degree of evidence necessary to establish proof in a civil or a criminal proceeding. Until very recently, what ought to be the standard of B proof in a civil case in our country had not been as clear as could be. In fact, there had appeared to be two different standards of proof for civil cases. While generally, the standard of proof for most civil claims was on proof on the balance of probabilities, however, where a claim is premised upon a perpetration of fraud upon the plaintiff it was required to be proved on the C standard of beyond a reasonable doubt. See, the case of *Au Kong Weng* case among the slew of authorities on this issue. But the apex court had in August 2015 in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 ruled that the correct standard of proof that D applies in all civil cases, regardless of what is being pleaded by the plaintiff against the defendant, must be the standard of proof premised on the balance of probabilities, and the onus upon whom to prove such an allegation remains with the plaintiff. Section 103 of the Evidence Act 1950 is clear, in that one who alleges a fact bears the burden to prove the same.

E

[42] In that regard, we noted in the record of appeal that the DC's report to the DB, it did not allude to any standard of proof that it had subjected the evidence adduced before it to. In other words, the collective evidence was not subjected to any known rigorous test before the DC arrived at its conclusions F that it did. This was clearly a case of an omission on the part of the DC to direct its mind, as to the standard of proof against which the evidence ought to be subjected to in coming to its conclusion. In the absence of any record of evidence at the DC pertaining to that crucial part of the proceedings, it would be impossible for the DB to ascertain any of those facts, even if it was so minded G to do.

[43] We had looked at the records of appeal on this issue. We agreed with learned counsel that the DC had not addressed the critical issue of dishonesty on the part of the appellant at all. We did not see any reference by the DC as to H what standard of proof the evidence that were adduced were subjected to by the DC. The DC in this appeal had failed to comply with the proper procedure in its decision-in making process in coming at its conclusion before making its recommendations to the DB. We agreed with learned counsel for the appellant that there had been an omission on the part of the DC amounting to a I misdirection.

[44] At this appeal stage, since this case has not been finally resolved and disposed of, the applicable standard of proof to be applied is the correct standard of proof, as so determined by the apex court in the *Sinnaiyah & Sons*

case, which is one that is on the balance of probabilities (see also, the case of *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254b; [1977] 1 LNS 86).

APPRECIATION OF EVIDENCE

[45] The appellant also complained that the DC and followed by learned High Court judge, had failed to appreciate the evidence that the alleged sum of RM70,000 was never credited into his firm's client account ie the appellant did not receive the said sum. It was not disputed that the respondent did not come to testify before the DC. It was her allegation that the appellant did not refund to her RM70,000 pursuant to the purchase of the house. But she failed to produce any documentary evidence to show that her banking account had indeed been debited to such amount in 2001 when the transaction was alleged to have happened. She only realised this 'loss' some 11 years later when she was looking into her file. No banking documents tending to back up that allegation were tendered before the DC hearing. She then lodged a police report on such discovery. Compared to the evidence adduced by the appellant, he had adduced contemporaneous evidence showing that no such amount was banked into his firm's client account. It was his evidence that he had returned the physical cheque to the respondent. He testified that his firm had no other banking account. In this scenario, the DC and later the learned High Court judge preferred the evidence of the respondent's husband to that of the appellant's despite the contemporaneous documentary proof adduced by the appellant. The DC found the police report as evidence that the respondent had merits in her complaint, despite the fact that the respondent chose not to appear to testify at the DC hearing and neither did she offer herself to be cross-examined by the appellant. With respect, a finding of fact ought to be backed by credible evidence. A piece of documentary evidence so contemporaneous to the impugned event would inspire more confidence in the absence of evidence of similar nature coming from the adverse party. The learned High Court judge made no comment of the fact that the respondent did not adduce contemporaneous banking documents that would evince the fact that her account had been debited to the tune of RM70,000. In fact, the explanation made on her behalf that a check with Maybank was a mistake because the Oriental Bank Bhd was taken over by Hong Leong Bank, not by Maybank. On the other hand, the learned High Court judge had cast doubt on the appellant's documentary evidence by speculating that the appellant might have another bank account into which appellant could have banked in the cheque worth RM70,000 from the respondent. She had even ruled that the appellant failed to corroborate his evidence that he had no other bank account when it was not even his assertion in the first place. Also, that was never the respondent's case against the appellant to begin with.

DELAY OF 11 YEARS TO BRING UP THE COMPLAINT AGAINST THE APPELLANT

[46] We noted too that there was a delay of 11 years before the complaint was lodged against the appellant. The reason offered by the respondent for the delay of 11 years before complaining to the DB was that she only realised that a sum of RM70,000 was missing from her account. Delay, in itself may, or not, lead to an adverse finding by the court against the party in delay. But any delay ought to be explained away reasonably. We found that the learned High Court judge did not entirely address her mind on this issue. With respect, in the circumstances, we agreed with learned counsel for the appellant that such a reason was inherently incredible to be believed.

[47] The contradictions in the evidence of the appellant on the two cheques were in themselves insufficient as a foundation to make a finding of dishonesty, especially in light of the 11 years' delay, that remained unexplained by the respondent. With respect, herein lies the misdirection on the part of the DC and the learned High Court judge on the issue of onus of proof in this case. The manner in which the hearing was conducted seemed to give the impression that it was a case *akin* to *res ipsa loquitor*, where the respondent needed only to lodge a complaint on the loss of her monies against the appellant and hence forth it had become incumbent upon the appellant to rebut such allegation of dishonesty on his part. To our minds, the respondent as the initiator of the proceedings bears the burden of establishing her case against the defendant. At the very least, we agreed with learned counsel for the appellant that she would have to show proof that she had her bank account deducted to the tune of RM70,000 before the burden shifted to the defendant to establish his case. Coupled with the long delay of nearly 11 years before the respondent lodged a police report against the appellant, for which her justification was inherently incredible, it would be quite difficult for the respondent to have discharged the onus of proof that the law places on her shoulders, like any other plaintiff. With respect therefore, we were in agreement with learned counsel for the appellant that the DC had misdirected itself on the proper placement of the onus of proof in this case. It had in effect, reversed the burden of proof by requiring the appellant to show proof of his innocence rather than first requiring the respondent to show proof that she had indeed suffered a loss of RM70,000 which she only realised 11 years after the alleged event. In affirming the DC's ruling, the learned High Court judge had, with respect, fallen into serious error as well.

[48] We agreed with learned counsel for the appellant that the reason for the delay in lodging the complaint was not satisfactory. The fact that the respondent did not appear in court to be confronted by the appellant by way of cross-examination had the adverse effect of exacerbating her case and that had

not helped in advancing her case against the appellant, moving forward.

[49] With respect, we agreed with learned counsel for the appellant that the learned High Court judge had fallen into error in the manner that she had evaluated the evidence before her.

OUR FINDINGS

[50] The courts will be very slow to disturb the sanctions that have been meted out on errant lawyers who have been *properly* found to be guilty of misconduct in the performance of their professional duties based on the principle of judging by one's peers. That having been said, however, the courts have never been slow to, or to shy away from subjecting the impugned DB's decision to curial scrutiny, if there is a complaint on the process undertaken in the decision-making process, on grounds of breach of natural justice or procedural impropriety, as well as on the merits of the DB's decision that was based on the DC's recommendations, in so far as attaching of liability is concerned. in other words, the courts will always be vigilant in ensuring that due legal process had been properly observed in the course of the prior proceedings that were set into motion to determine whether the complaints had been proven against the lawyers alleged to have been guilty of misconduct by their clients. We believe this instant appeal was one such case on point.

[51] With that realisation at the forefront of our minds, we were of the considered view that the DC in this case had fallen short of the standard required to be observed in coming to its decision that was adverse against the appellant. With respect, the learned High Court judge too had fallen into error when she had affirmed the decision of the DB which had acted on the DC's flawed findings.

[52] The unsatisfactory delay and the unsatisfactory records of the notes of evidence in the DC hearing had materially compromised its decision and that of the DB, in that it opened to serious doubt as to what materials the DB had before it, in coming to its decision in varying the recommendations of the DC, when it imposed the ultimate sanctions against the appellant. The High Court, by necessary extension had suffered from the same shortcomings, thereby casting serious doubt as to its decision.

[53] By way of reiteration, we were constantly reminded of the words of Lord Denning in the *B Surinder Singh Kanda*'s case where he had said:

> No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially. And the greater the importance of observing

A the maxim, *audi alteram partem.*

[54] In the context of overall factual matrix of this case, even applying the standard of proof, on the balance of probabilities on the evidence as adduced by the respondent before the DC, we were of the considered view that respondent had fallen short of establishing her complaint against the appellant.

[55] We therefore found that it was not safe, based on the record of appeal, to affirm the learned High Court judge's decision that had affirmed the decision of the DB. We had therefore allowed this appeal. We noted the various infirmities that had plagued the DC's decision that had been affirmed by the High Court. We set aside the decision of the High Court judge dated 27 May 2015 as well as the decision of the DB dated 17 January 2015. We made no order as to costs and we further ordered that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Afiq Mohamad Noor